

Brantly Development,  
Group, Inc.,

Petitioner

\* Before The Zoning Board  
\* of Howard County  
\* ZB Case 1068M

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### **DECISION AND ORDER**

On November 5, 12 and 19, 2008, the Zoning Board of Howard County, Maryland considered the petition of Brantly Development Corporation for an amendment to the Zoning Map of Howard County so as to reclassify from the R-ED to the R-A-15 Zoning District a 4.5 acre parcel of land located on the northeast corner of the ElkrIDGE Crossing Way intersection with Montgomery Road. The subject property is described as Tax Map 38, Grid 2, Parcel 655, and the address is 7211 Montgomery Road. The rezoning request includes site plan documentation for a residential development of 48 townhouses.

The notice of the hearing was advertised, the subject property was posted and adjacent property owners were notified by mail in accordance with the notice requirements as evidenced by the certificates of advertising, posting and mailing to adjacent property owners, all of which were made part of the record. All of the official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning, the reports of the responding reviewing agencies, and the Planning Board Recommendation were incorporated into the record of the hearing. Both the Department of Planning and Zoning and the Planning Board recommended denial of the petition.

The Petitioner was represented by Sang Oh, Esquire. The Zoning Counsel, Eileen Powers, Esquire, appeared to defend the 2004 Comprehensive Zoning of the subject

property in the R-ED District. Mr. and Mrs. Bauman, represented by Katherine Taylor, Esquire, appeared in opposition to the petition. Several other residents appeared in opposition and represented themselves.

After careful evaluation of all the information presented the Zoning Board makes the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

1. The Petitioner, Brantly Development Group, Inc. is the contract purchaser of the subject property. The owner, Mrs. McMullen, is in agreement with the requested rezoning of the 4.5 acre subject property from the R-ED to the R-A-15 Zoning District. The Petitioner also submitted a documented site plan with the petition, but the Board will not reach any of the issues related to the documented site plan based on its denial of the requested rezoning.

2. The subject property, Parcel 655, is improved with a single-family detached dwelling and a barn. The testimony indicated that Mrs. McMullen lives in the single-family detached dwelling. The subject property for many years has had driveway access to Montgomery Road through an easement but does not have fee simple frontage on Montgomery Road. Mr. Liparini, a principal of the Petitioner, testified that he had granted Mrs. McMullen access from her driveway to Elkridge Crossing Way, a road constructed as part of the adjacent Elkridge Crossing development.

The subject property was zoned R-20 until the 1993 Comprehensive Zoning at which time the subject property was re-zoned to the R-ED District. The R-ED zoning of the subject property was continued in the 2004 Comprehensive Zoning.

3. The property located to the east and south of the subject property is Elkridge Crossing. In the 2004 Comprehensive Zoning this 27 acre property was rezoned from R-ED

to CAC-CLI. The residential density permitted in the CAC District is 25 dwelling units per net acre. Originally this property consisted of only the Elkridge Drive-In property in the 2004 Comprehensive Zoning process but later the Harper property was added to the combined properties re-zoned to CAC-CLI and developed as Elkridge Crossing. The Harper property had been zoned R-ED prior to the 2004 Comprehensive Zoning.

Elkridge Crossing is a mixed-use community of proposed office, retail and residential, both condominium apartments and condominium townhomes. Mr. Liparini indicated that 142 of the planned 362 homes had been developed to date.

4. The properties to the north and west of the subject property and north of Montgomery Road, the Cager property (parcel 26), the Bauman property (parcel 475) and the school properties are all zoned R-ED and have the same zoning history as the subject property. The properties to the west and southwest of the subject property, across Montgomery Road, were zoned R-A-15 in the 1993 and the 2004 Comprehensive Zonings. Of these properties, Parcel 702 is improved with a single-family detached dwelling, while Parcel 842 is developed with the Lawyers Hill Apartments development.

5. Mr. Liparini testified that the purpose of the R-ED District, in his view, was to protect environmentally sensitive properties such as those with steep slopes or located in stream valleys. Mr. Liparini presented an elevation study of the vicinal area of the subject property to show that the area to be protected is generally west of I-95. He also indicated that properties east of a ridge line east of I-95, including the subject property, drain to the east not to the Patapsco Stream Valley, and that this information as to drainage was not available at the time of the 2004 Comprehensive Zoning. He also indicated that it was questionable in his view why properties east of this ridge line should be zoned R-ED. Mr.

Liparini reiterated that the subject property, like the Harper property, has no steep slopes and does not drain towards the Patapsco Stream Valley.

Mr. Liparini testified that he believed the basis of the R-ED zoning of the subject property in the 1993 Comprehensive Zoning, which was continued in the 2004 Comprehensive Zoning, was to protect environmentally sensitive properties, and that if the Council had been aware of the drainage patterns of the subject property and nearby properties it would not have zoned the subject property as R-ED. He acknowledged that he did not look at the records of the 1993 Comprehensive Zoning with respect to the subject property.

Mr. Liparini testified that there was no need to zone the McMullen property R-ED in order to protect the Patapsco stream valley because of the topography of the subject property and nearby properties.

Mr. Liparini also testified that the pond located on the Bauman property was not fed by a stream, and that it was a man-made pond resulting from a pit dug to mine iron ore years before. He also indicated that there may be some minor drainage of run-off from the western part of the subject property into the pond.

6. Petitioner's environmental consultant, Mr. Robert Sheesley, also testified that the pond located on the Bauman property, which he estimated to be  $\frac{1}{4}$  acre in size, was made-made and that the source of its water was rainwater run-off not a spring. He also indicated that he did not believe the pond drained into nearby eco-systems, and that the pond was self-contained environmentally. He indicated that he did not believe the subject property had a high proportion of sensitive environmental resources. He also indicated that he did not think the pond located within 40 feet of the subject property was an environmental resource.

Mr. Sheesley indicated that his conclusions regarding the pond came as a result of the Phase I environmental study of the property that he conducted, a study that lenders require as security against environmental liabilities. He indicated that in conducting this study he collected data within one mile of the subject property. He indicated that he examined water resources, slopes, particularly those with erodable soils and large-tree vegetation systems in the study area.

He testified that sensitive environmental areas could be protected through buffers and land use policies such as zoning properties R-ED. Mr. Sheesley stated that there has been a constant decline in the vegetation in the area over the last 50 years, and that the patch of woods between the ElkrIDGE Crossing development and the subject property was not, in his opinion, an area that merited protection as a significant environmental resource. Mr. Sheesley reiterated his view that only properties that have environmental resources that should be protected should be zoned R-ED, and that the subject property is no longer part of such an area.

Mr. Sheesley acknowledged that there is wildlife on the subject property but that he did not believe that made the subject property a major environmental resource. Mr. Sheesley concluded that only substantial environmental resources were worthy of protection, including through zoning. Mr. Sheesley testified that the area surrounding the subject property, part of the larger area east of I-95, had lost any connectivity to sensitive environmental areas due to development and the consequent breakdown of the associated ecosystems. He also indicated that he believed the area west of I-95 still had good ecosystems worthy of protection but that the areas east of I-95 were not as worthy of protection anymore.

6. There was testimony provided by Ben Bauman, co-owner for 20 years with his wife of the adjacent Bauman property, contradicting the testimony of Mr. Liparini and Mr. Sheesley on several points related to environmental issues.

Mr. Bauman indicated that the pond was about 1 acre in size not  $\frac{1}{4}$  of an acre. While he agreed that the pond was an old iron ore quarry, he disagreed that most of the pond water was rainwater run-off, although there is some water runoff from adjacent properties and Montgomery Road. He indicated the pond always had 10-12 feet of water even during dry periods, that it was usually 12-27 feet deep, and that the source of the pond water was a spring. He indicated that the temperature of the water was 55 degrees year round.

Mr. Bauman also testified that there is run-off from the pond to the Patapsco River, indicating that he and group of Boy Scouts had personally followed on foot the path of a stream produced by rain from the pond to the Patapsco.

7. Mrs. Betty McMullen testified that she was preoccupied during the last Comprehensive Zoning process and that she did not request rezoning of the subject property at that time because she wasn't interested in rezoning or selling her property. She also indicated that her primary concern at that time was real property taxes on the subject property and that she believed she would not be able to afford a rise in taxes that would come with an up-zoning. She also testified that she was told that she could always ask for rezoning at a later time. Finally, Mrs. McMullen testified that she was told by DPZ during the Comprehensive Zoning process that if she did not request rezoning as to her property, it would not be proposed for rezoning. Mrs. McMullen testified that she had changed her mind and now requested rezoning for her property so she could have the increased value that a rezoning would bring for her retirement.

8. Mr. Liparini testified that because Mrs. McMullen was not interested in pursuing rezoning during the 2004 Comprehensive Zoning process, the County Council did not look at the appropriateness of R-ED zoning for the subject property, and merely continued the R-ED zoning which was first placed on the property in the 1993 Comprehensive Zoning. Mr. Liparini testified that the subject property was surrounded by the Elkridge Crossing development, schools, apartments and townhouses.

Mr. Liparini also testified that while the subject property lacked public road frontage, Zoning Map 38 used by the County Council during the 2004 Comprehensive Zoning made it appear as though the subject property did have public road frontage. Mr. Liparini indicated that this map failed to show that a R-A-15-zoned triangular-shaped "wedge" parcel actually separated the subject property from Montgomery Road. Mr. Liparini testified that he did not request CAC zoning for the subject property when he came in for CAC zoning for the Elkridge Crossing properties. He also indicated that CAC zoning was not appropriate for the McMullen property because of the retail component of CAC zoning. Mr. Liparini indicated that R-A-15 zoning was appropriate for rezoning for the subject property because it could allow the provision of significant open space to buffer the development from the adjacent R-ED properties. Mr. Liparini indicated that he thought it was a mistake that the assemblage of properties for the Elkridge Crossing rezoning in the 2004 Comprehensive Zoning did not include the subject property.

Mr. Liparini didn't contradict the fact that the tax map made part of Protestant's Exhibit 1, submitted in support of the Harper property's request for rezoning during the 2004 Comprehensive Zoning process, apparently shows the "wedge" property located between the subject property and Montgomery Road.

9. Mr. Liparini testified that he provided access to the subject property through his private road in Elkridge Crossing, and that Mrs. McMullen agreed to move her existing driveway to Montgomery Road for his accel/decel lane required for his development. The Howard County Department of Planning and Zoning had previously informed Mrs. McMullen by letter in 2005 (Petitioner's Exhibit 8) that the Elkridge Crossing development could not be required to provide public road frontage to the subject property by Section 16.119(a)(8) of the Howard County Subdivision and Land Development Regulations.

Mr. Liparini testified that the subject property could not be further subdivided without public road frontage absent a waiver of the Subdivision Regulations. He did acknowledge that the subject property could be developed without a subdivision through a condominium form of ownership without public road frontage. He also indicated that the access he granted to Mrs. McMullen through the Elkridge Crossing development for the subject property was not restricted to single-family detached lots.

The Petitioner presented as its Exhibit 18, a copy of page 2-59 of Vol. III of the Howard County Design Manual, which requires a 24 foot wide easement and 14 feet of pavement as minimum requirements for a residential driveway. Petitioner contended that this requirement would have to be waived in order for the subject property to be further developed under a condominium form of ownership.

10. The Howard County Zoning Counsel presented several documents to the Zoning Board, including several deeds of the subject property showing that it had a 14 foot wide right-of-way, and Maryland Department of Assessments and Taxation records indicating that several properties nearby the subject property were zoned R-ED.



11. The Petitioner claimed that rezoning was justified based only on mistake in the last comprehensive zoning.

The evidence that Petitioner presented to show a mistake in the R-ED zoning of the subject property by the 2004 Comprehensive Zoning is summarized above and included the following:

a. That the subject property lacked frontage on a public road, a fact of which the County Council may not have been aware, according to Petitioner, based on the maps used by the County Council during the 2004 Comprehensive Zoning process;

b. That the lack of a possibility of assemblage of properties to include the subject property for development at the time of the 2004 Comprehensive Zoning has proven to be a false assumption with the passage of time in that the property owner is now willing to rezone and develop her property;

c. That the County, through the Department of Planning and Zoning, should not have recommended continuing R-ED zoning for the subject property in the 2004 Comprehensive Zoning, regardless of the property owner's desires at the time, based on good planning principles; and

d. That there were physical characteristics of the property, including that the subject property does not drain into the Patapsco River Valley, and that it did not have any environmental resources located on it, of which the Council was unaware at the time of the 2004 Comprehensive Zoning.

12. The Board makes the following findings of fact as to Petitioner's contentions as to mistake in comprehensive zoning:

a. The Board does not find that it is clear that Howard County Zoning Map 38 would conclusively indicate to a reasonable observer that the subject property has frontage on a public road. The Board also finds that the tax map of the area subject property, which was also available to the County Council during the 2004 Comprehensive Zoning process, seems more likely to indicate that the triangular-shaped property adjacent to the subject property does separate it from public road frontage. The Board also finds that there was no credible evidence presented to indicate that public road frontage was a significant factor for the County Council in determining the appropriate zoning for properties in the 2004 Comprehensive Zoning process, including the subject property.

The Board finds that the subject property's lack of public road frontage would make its subdivision as a self-contained property impossible, regardless of its zoning, absent the granting of a waiver by DPZ from the frontage requirements of Section 16.119(a)(8) of the Subdivision Regulations. Regardless of the subject property's zoning, the property would only be able to develop without a Subdivision waiver under a condominium form of ownership, with Design Manual waivers as to minimum driveway easement and paving widths likely required even under that development method. Also regardless of the subject property's zoning, its best development scenarios might include gaining access through, or development with, an assemblage of adjoining properties, including other R-ED-zoned properties. The Board is not convinced that the Petitioner presented sufficient evidence for the Board to find that the County Council would have re-zoned the subject property to a zoning category other than R-ED, if it had focused on its public road frontage status at the time of the 2004 Comprehensive Zoning.

b. Mrs. McMullen was not interested in pursuing rezoning of the subject property during the 2004 Comprehensive Zoning process, thereby making inclusion of the subject property in the assemblage of properties for the Elkridge Crossing 2004 Comprehensive Rezoning request impossible. Mrs. McMullen has since changed her mind and would like to rezone her property to R-A-15 and sell it to Mr. Liparini so that he can develop the property.

The Board finds that the only thing that has changed in terms of events occurring subsequent to the 2004 Comprehensive Zoning is Mrs. McMullen's intentions as to the development of her property. While the inclusion of the subject property in the Elkridge Crossing assemblage of properties in the 2004 Comprehensive Zoning and its subsequent development might have been a good idea at that time, the Board finds that the time for that assemblage has passed. In addition, the subject property could just as easily have been assembled for development with other R-ED properties, and may still be able to be so assembled and developed in the future. The Petitioner acknowledged that CAC-CLI zoning, the zoning of the assembled Elkridge Crossing properties, would be inappropriate for the subject property, so that the requested R-A-15 zoning for the subject property and its subsequent development would simply be a higher density residential development than R-ED development. Either of these developments could occur adjacent to, and perhaps in coordination with the Elkridge Crossing mixed-used use CAC-CLI development, but neither could any longer be a product of a true assemblage of properties for rezoning;

c. Petitioner contends that the R-ED zoning of the subject property was a mistake based on the Department of Planning and Zoning's decision to purportedly "abandon good planning principles" by not overriding Mrs. McMullen's decision not to seek

rezoning during the 2004 Comprehensive Zoning process. The Petitioner's only support for this contention was its allegation that DPZ did ignore property owners' desires in other instances during the 2004 Comprehensive Zoning, and its belief that rezoning the subject property as part of an assemblage of properties during the 2004 Comprehensive Zoning would have been a good idea;

d. The Petitioner contends that there are two physical characteristics of the subject property and its immediate environs, of which the County Council was unaware at the 2004 Comprehensive Zoning, that if known would have caused the Council to not zone the property R-ED: 1) that the topography causes drainage to the east, away from the Patapsco River Valley; and 2) that there are no significant environmental features remaining to protect. Petitioner's theory of mistake is based on its contention that because of these factors the subject property does not fulfill the purpose of the R-ED District "to accommodate residential development . . . in areas with a high proportion of sensitive environmental . . . resources".

The Board finds that Petitioner presented substantial evidence to show that the drainage of the subject property and its environs was generally away from the Patapsco River Valley due to the topography, but it cannot find that there was sufficient evidence presented to overcome the presumption that the County Council was aware of this information.

As to Petitioner's contentions regarding the alleged lack of a presence of sensitive environmental features on the subject property and environs, the Board cannot find that Petitioner met its burden of establishing this fact. Mr. Bauman, the owner of the property adjoining the subject property, presented credible testimony, which the Board accepts, that

the substantial pond on his property is spring-fed and drains to the Patapsco River, and therefore could reasonably be considered to be a sensitive environmental feature worthy of protection. In addition, the Board cannot find that there was sufficient evidence presented to overcome the presumption that the County Council was aware of this information as well.

In any case, the Board finds that even if one assumes Petitioner's contentions as to these two physical characteristics of the subject property and its environs have been established, and further assumes that the Board was not aware of this information during the 2004 Comprehensive Zoning process, there is still insufficient evidence presented to show that these factors would have been a significant in the County Council's decision as to whether or not it would zone the subject property R-ED.

The subject property and several adjoining and nearby properties were initially zoned R-ED in the 1993 Comprehensive Rezoning, and that zoning was continued in the 2004 Comprehensive Zoning. The presumption of correctness of the R-ED zoning was therefore reaffirmed in 2004. The Board finds that not every property zoned R-ED must have a "high proportion of sensitive environmental features" in order to qualify for R-ED zoning; the purpose of R-ED is only that it be established in areas with such characteristics. The Petitioner did not present sufficient evidence to show the subject property's R-ED zoning conflicted with this purpose. Every substantial area of R-ED zoning will have "edges" comprised of properties that may have a lower intensity of sensitive environmental areas than core areas. R-ED zoning, like all zoning, must extend to and stop at some property.

### CONCLUSIONS OF LAW

1. The Petitioner, as one seeking a piecemeal zoning reclassification, has the burden of establishing substantial change in the character of the neighborhood or a basic and actual mistake in the comprehensive zoning of the subject property in order to justify a rezoning. If this burden is not met, the Zoning Board is not permitted to grant rezoning.

2. The evidence which Petitioner has presented to show mistake in the R-ED zoning of the subject property by the 2004 Comprehensive Zoning is not sufficient to overcome the strong presumption of correctness attached to comprehensive zoning so as to justify rezoning on the basis of mistake. Therefore, the Board concludes that the Petitioner has not established sufficient evidence of mistake in the R-ED zoning of the subject property by the 2004 Comprehensive Zoning to justify the requested R-A-15 zoning. The Board makes this conclusion cognizant of the case law providing that a more liberal standard is applied to the mistake rule when the rezoning requested is from one residential zoning classification to another. The Board makes the following conclusions of law as to each of Petitioner's contentions as to mistake:

a. The Board rejects Petitioner's contentions that there was substantial evidence presented enabling the Board to conclude that the County Council mistakenly believed that the subject property had public road frontage during the 2004 Comprehensive Zoning process. Moreover, the Board concludes that there was not substantial evidence presented that the County Council considered the subject property's public road frontage status significant in determining its zoning during the 2004 Comprehensive Zoning process;

b. The Board rejects Petitioner's contentions that Mrs. McMullen's decision that she would now like to develop the subject property with more dense residential zoning constitutes an event occurring subsequent to comprehensive zoning which shows that the premises upon which the subject property's zoning was based, have proven to be invalid through the passage of time. There was not convincing evidence produced to allow the Board to conclude that the premise of the County Council's decision to continue the R-ED zoning of the subject property in 2004 was based simply on the property owner's desire or lack of desire to be included in an assemblage of properties for a proposed rezoning during the 2004 Comprehensive Zoning. The Petitioner has not overcome the presumption of correctness accorded the County Council's decision to continue, from the 1993 Comprehensive Zoning, the fairly large area of properties northeast of Montgomery Road in the R-ED Zoning District, of which the subject property forms an edge;

c. In order to justify a piecemeal rezoning based on a mistake in comprehensive zoning, the mistake must be that of the legislative body not the planners. The Board concludes that the Petitioner has not presented sufficient evidence to support a conclusion that a mistake was made by DPZ based on its refusal to override the property owner's desires as to zoning at the 2004 Comprehensive Zoning. Moreover, any alleged proof of mistake by DPZ is not probative on the only material issue for the Board to decide - whether the Council made a mistake in the 2004 Comprehensive Zoning of the subject property;

d. While the Petitioner presented sufficient evidence for the Board to conclude that the topography of the subject property and the properties around it caused water to drain away from the Patapsco River, it did not produce sufficient evidence for the

Board to conclude that the presumption that the County Council was aware of this fact had been overcome.

The Petitioner did not produce sufficient evidence for the Board to conclude that there are no significant environmental resources remaining to protect in the area of the subject property. It also did not produce sufficient evidence for the Board to conclude that the presumption that the County Council was aware of the general environmental conditions of the area of the subject property at the time of the 2004 Comprehensive Zoning had been overcome.

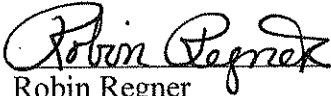
Finally, the Petitioner did not produce sufficient evidence for the Board to conclude that these physical characteristics were significant factors for the County Council in deciding the zoning of the subject property in the 2004 Comprehensive Zoning. The Board concludes the R-ED District's purpose does not require that every R-ED-zoned property must "have a high proportion of sensitive environmental resources" but only be "in areas" generally meeting these characteristics.

4. Petitioner did not contend that there was a change in the character of the neighborhood of the subject property or that it was denied all reasonable use of his property under R-ED zoning, so those issues need not be addressed by the Board.

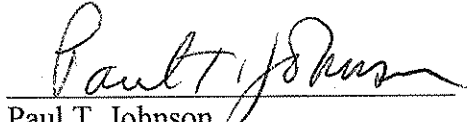


For the foregoing reasons, the Zoning Board of Howard County, Maryland, on this 27<sup>th</sup> day of May, 2009 hereby **DENIES** Petitioner's request for rezoning of the subject property from the R-ED to the R-A-15 Zoning District.

ATTEST:

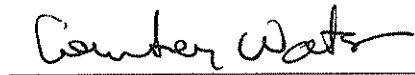
  
Robin Regner  
Administrative Assistant

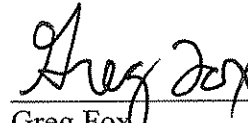
PREPARED BY HOWARD COUNTY  
OFFICE OF LAW  
MARGARET ANN NOLAN  
COUNTY SOLICITOR

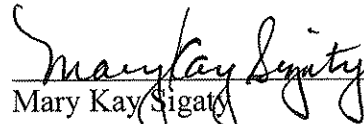
  
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